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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
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EXAMINER

NELSON, MICHAEL B

ART UNIT

PAPER NUMBER

1783

NOTIFICATION DATE

DELIVERY MODE

06/10/2010

ELECTRONIC

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Notice of the Office communication was sent electronically on above-indicated "Notification Date" to the following e-mail address(es):

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Office Action Summary	Application No. 10/580,831	Applicant(s) KANZAKI, KEIZOU	
	Examiner MICHAEL B. NELSON	Art Unit 1783	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 01 March 2010.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1 and 6-15 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1, 6-15 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
 2. ☐ Certified copies of the priority documents have been received in Application No. _____.
 3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|---|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413) |
| 2) <input type="checkbox"/> Notice of Draftperson's Patent Drawing Review (PTO-948) | Paper No(s)/Mail Date. _____ |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08) | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| Paper No(s)/Mail Date _____ | 6) <input type="checkbox"/> Other: _____ |

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DETAILED ACTION

Response to Amendment

1. Applicant's amendments filed on 03/01/10 have been entered. Claims 1 and 6-15 are currently under examination on the merits.

Examiner's Note

2. The use of product-by-process limitations has been noted in Claim 1, such as, for example, "print" layer. Even though a product-by-process is defined by the process steps by which the product is made, determination of patentability is based on the product itself. In re Thorpe, 777 F.2d 695, 227 USPQ 964 (Fed. Cir. 1985). As the court stated in Thorpe, 777 F.2d at 697, 227 USPQ at 966 (The patentability of a product does not depend on its method of production. In re Pilkington, 411 F.2d 1345, 1348, 162 USPQ 145, 147 (CCPA 1969). If the product in a product-by-process claim is the same as or obvious from a product of the prior art, the claim is unpatentable even though the prior product was made by a different process.).

Claim Rejections - 35 USC § 103

3. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

4. The factual inquiries set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

1. Determining the scope and contents of the prior art.

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2. Ascertaining the differences between the prior art and the claims at issue.
 3. Resolving the level of ordinary skill in the pertinent art.
 4. Considering objective evidence present in the application indicating obviousness or nonobviousness.
5. Claims 1, 6, 11, 14 and 15 are rejected under 35 U.S.C. 103(a) as being unpatentable over Oshima et al. (U.S. 4,834,247), in view of Tucker (U.S. 2003/0155354) and further in view of Ewan (U.S. 5,294,470) and further in view of Matsuguchi et al. (U.S. 4,721,638).

Regarding claim 1, Oshima et al. discloses a hermetically heat-sealed plastic food container with a vapor release seal part which opens at high pressures (See Abstract). Oshima et al. does not disclose markings which indicate when the vapor release seal part is opened. Tucker discloses a plastic food container which vents during microwave cooking ([0096]) and which is provided with differing colors for the lid and the base material in order to indicate whether the lid is opened (i.e. venting) or closed ([0137]-[0138]).

The inventions of both Oshima et al. and Tucker are drawn to the field of microwavable venting food containers and therefore it would have been obvious to one having ordinary skill in the art at the time of the invention to have modified the materials for the lid and base material in the container of Oshima et al. by using different colors as taught by Tucker for the purposes of imparting indicating means for informing the user if the container is opened or closed.

Modified Oshima et al. does not disclose the particular opening indicator as instantly claimed, although the Tucker reference shows the advantage of an opening indicator in general for a microwave container. Ewan discloses a marking indicator which indicates whether a flap on a package is open or closed (See Abstract, Fig. 1-4). The indicator is provided by printing various pigmented layers of varying adhesive strength (Fig. 5-7, C5, L5-C6, L20). When the package is opened the printed layers separate in a manner that provides each flap with pigmented

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areas and void areas which are the negative image of each other (Fig. 7). Both the pigments remaining on substrate 22 and the pigments remaining on substrate 24 are "printed layers" in that they are initially printed only onto substrate 24 and then printed onto substrate 22 when the flap is folded down (Fig. 5-7). It is also noted that the layers do not need to be printed since the "printed layer" limitation is given limited patentable weight (See Examiner's Note above). Ewan also shows that when creating an indicia that is to be born in negative and positive forms it is routine that one of the patterns would be larger than the other. By way of example, looking at Fig. 3 of Ewan, the separation of the layers leaves parts of the layers on both the flap, 18, and the body, 22. The portion that remains on the body is made of pigmented parts (i.e. the letters) with parts being void of pigments (i.e. the spaces in between the letters). The portion that remains on the flap is made of void parts (i.e. the letters) and pigmented parts (i.e. the spaces between the letters) which correspond to the void parts on the body and have parts void of pigment around them. Because the pigmented parts of flap form from the background of the image they are larger than the pigmented parts (i.e. the letters) formed on the body. The alteration of the indicia and its background would have been within the ordinary skill in the art and, as shown in Ewan, the background bearing the pigments will often be larger than the void parts left in between the lettering of the foreground.

It would have been obvious to have provided the indicating means of Ewan in between the two layers of modified Oshima et al. in order to not only indicate when the container is opened by steam, as taught by Tucker, but also to indicate if there has been any tampering with the seal of the container prior to purchase by the consumer (as evidence by whether or not the adhesive is broken).

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In addition to the foreground/background pigmentation of Ewan, the addition of other pigment layers above and below the layer designed to separate with the separation of the indicator would result in certain pigment parts being larger than their corresponding void parts depending on which indicia is printed. In Matsuguchi et al, a tamper indicating seal is disclosed with a pigmented layer, 223, which upon separation formed negative pigmented and void parts (Fig. 11) and which also has indicia, 224 and 222, formed above and below this pigment separation layer, to further indicate to the consumer the status of the seal (C5, L5-10 and C5, L60-65) which from Fig. 11 are shown to overlap and be larger than the void parts formed during the separation of the pigment layer 223. Modified Oshima does not disclose additional indicia above and below the tamper indicating seal of Ewan; however, one having ordinary skill in the art would have found it obvious to have done so in order to more clearly indicate to the consumer the status of the seal with additional indicia.

Regarding claims 6, 11, 14 and 15, modified Oshima et al. discloses all of the limitations as set forth above. With respect to claim 6, Oshima et al. discloses the vapor release seal part is formed continuously along a peripheral edge seal of the container (Fig. 1). With respect to claim 11, a plastic pouch is also disclosed in the invention of Oshima et al. (Fig. 6). With respect to claims 14 and 15, the seal portion of the tray embodiment of Oshima et al. has flange parts and a lid with the heat seal part extending towards the inside of the container (Fig. 1 and C2, L5-25).

6. Claims 7 and 8 are rejected under 35 U.S.C. 103(a) as being unpatentable over Oshima et al. (U.S. 4,834,247) in view of Tucker (U.S. 2003/00155354) and further in view of Ewan (U.S.

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5,294,470) in view of Matsuguchi et al. (U.S. 4,721,638) as applied to claim 1 above and further in view of Isakson et al. (U.S. 4,640,838).

Regarding claims 7 and 8, modified Oshima et al. discloses all of the limitations as set forth above. Modified Oshima et al. does not disclose that the valve member be separate from the peripheral edge or any particular indicia. Isakson et al. discloses a valve for a hermitically sealed pouch which is not located along the periphery (See Abstract and Fig. 2). The valve is of a similar type as that of Oshima et al. in that it is a flap held with an adhesive which is designed to disengage upon microwave cooking (Fig. 5 and C5, L15-45). The embodiment of Isakson et al. in Fig. 6 comprises a slit. The placement of the valve a distance away from the peripheral sealed edges of the container allows for food inside the container to be contained more effectively even after the valve is opened by the steam pressure (i.e. if the valve were along the side sealed edges when the container were removed from the microwave liquid could spill out the sides).

The inventions of both modified Oshima et al. and Isakson et al. are drawn to the field of microwaveable vented containers and therefore it would have been obvious to one having ordinary skill in the art at the time of the invention to have modified the vent placement in the container of modified Oshima et al. by placing the valve a distance from the edges of the container as taught by Isakson et al. for the purposes of imparting improved food containing ability when the valve is opened.

7. Claims 9, 10, 12 and 13 are rejected under 35 U.S.C. 103(a) as being unpatentable over Oshima et al. (U.S. 4,834,247) in view of Tucker (U.S. 2003/00155354) and further in view of

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Ewan (U.S. 5,294,470) in view of Matsuguchi et al. (U.S. 4,721,638) as applied to claims 1 and 11 above, and further in view of Sato (GB 2,358,175).

Regarding claims 9, 10, 12 and 13, modified Oshima et al. discloses all of the limitations as set forth above. Modified Oshima et al. does not explicitly disclose the limitations of claims 9, 10, 12 and 13. Sato discloses a standing, branched base type microwaveable pouch (Fig. 1) with a cutout portion (Fig. 4) for the venting seal (See Abstract, part 21 is the exhaust opening) which can be used as a pouring port (Fig. 5). The pouring port is utilized by bisecting the two joining films which make up the vent. The invention of Sato is directed towards a specific marketable embodiment of a vented microwavable pouch which is directed towards the sterilization of, inter alia, baby feeding apparatuses (Page 1).

The inventions of both modified Oshima et al. and Sato are drawn to the field of microwavable venting pouches and therefore it would have been obvious to one having ordinary skill in the art at the time of the invention to have modified the pouch of modified Oshima et al. by using the pouring application of the vent port as taught by Sato for the purposes of imparting improved utility and marketability as a sterilization tool.

Response to Arguments

8. Applicant's arguments of 03/01/10 are considered moot in light of the new grounds of rejection which were necessitated by applicant's amendments. Arguments which are still deemed valid are addressed below.

9. Applicant argues that they have removed product by process limitations. This is not so. Claim 1 still recites that the pigmented layer is a "print" and is therefore still considered a product by process limitation in so much as it implies that the layer is printed. Moreover,

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applicant makes product by process arguments (arguing that the instant product is different from the product of the prior art because it is "printed" on a certain substrate as opposed to another).

The examiner has shown that the products of the prior art are still considered printed in that they are printed onto a substrate and then adhered to another substrate. To clarify, there is nothing wrong with claiming a product in terms of the process that it is made by (i.e. product by process) but the rationale that a product is patentable because of its process is given limited patentable weight (See examiner's note). Applicant does not need to remove the product by process language but applicant should be aware that limitations and arguments directed towards allowing a product because it is made in a different way than the prior art are given limited patentable weight if the final product would be the same either way. This is largely moot because the limitations in the claims do not even require that the product is made by a different process (i.e. as explained above, the layers in the prior art are still considered printed).

10. Applicant then argues that Ewan does not disclose pigmented parts which are larger than the void parts. As the examiner has explained in the new rejection this is not the case. The size of the pigmented parts in relation to the void parts is affected by what image or indicia is desired to stay attached to which substrate. Because Ewan puts pigmented parts on both substrates when there is separation, if the background pigmented parts are larger than the foreground void parts, then the resulting structure would read on the instant claims, as in Ewan Fig. 3. The examiner also notes that the "corresponds" language used in the claim does not necessarily require that the pigment parts and void parts occupy the same space when the two layers are joined. A pigmented part and a void part can correspond to each other by being in the same area or by

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being formed over or adjacent to each other. In Ewan, all the void parts correspond to the all the pigments parts in that they are printed in the same area.

11. In another obvious modification of the tamper indicator of Ewan (and indeed tamper indicators in general), the examiner has shown that by printing additional indicia it is possible to form printed portions that are larger than underlying or overlying void portions. Again, the pigments portions of Matsuguchi are considered to correspond to the void parts formed during the tearing of the label in the sense that they are printed in the same area and overlay each other (Fig. 9-11).

12. Applicant also argues that the prior art references are directed towards a different “purpose and technical feature” than the instant invention. The examiner notes that even if this is so, the argument is moot. A product which is made for a different purpose still reads on a claim if it is the same material product. The recitation that a product is to be used in a particular way does not confer patentability to the claim since the recitation of an intended use does not impart patentability to otherwise old compounds or compositions. In re Tuominen, 671 F.2d 1359, 213 USPQ 89 (CCPA 1982).

Conclusion

13. Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP § 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after

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the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to MICHAEL B. NELSON whose telephone number is (571) 270-3877. The examiner can normally be reached on Monday through Thursday 6AM-4:30PM.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, David Sample can be reached on (571) 272-1376. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/Patricia L. Nordmeyer/
Primary Examiner, Art Unit 1783

/MN/
05/31/10